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Supreme Court of the United States

OCTOBER TERM 1946

No. 850

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN E. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORNACK, JOHN H. LOCLES, CLARENCE F. DILLON, OTTO A. PHILIPP and HUGH B. BAKER,

Petitioners,

against

KARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

MILTON POLLACK,
EMERY H. SYKES,
HORACE R. LAMB,
LEWIS L. DELAFIELD,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM—1946.

No.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORNACK, JOHN H. ECCLES, CLARENCE F. DILLON, OTTO A. PHILIPP and HUGH B. BAKER,

Petitioners,

—against—

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners respectfully show:

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 10, 1946. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 187) is not yet reported. The opinion of the District Court (R. 163) is reported in 67 F. Supp. 223.

Statutes Involved.

The pertinent statutory provisions are set forth in the appendix, *infra*, pages 20-22.

Summary Statement of the Matter Involved.

This is a civil suit for an accounting and other relief brought in the Southern District Court of New York. The respondents-plaintiffs are trustees appointed in reorganization proceedings of Central States Electric Corporation pending in the District Court of Virginia under Chapter X of the Bankruptcy Act. The Virginia District Court authorized its trustees to bring this suit (R. 5). No "property" is involved. The petitioners-defendants were directors, officers, stockholders of, or otherwise connected in the complaint with the debtor. The claims asserted by the respondents-plaintiffs are alleged breach of fiduciary duties and waste and misappropriation of the assets of the debtor many years before the petition for reorganization was filed. The transactions complained of occurred from 16 to 28 years before this suit was commenced, except only one transaction, which occurred seven years previously.

Diversity of citizenship is not alleged. Jurisdiction is rested by the complaint, not upon diversity of citizenship, but upon the Constitution, the provisions of Sections 2a and 115 of the Bankruptcy Act and of Sections 24(1) and (19) of the Judicial Code.

The petitioners-defendants moved to dismiss the suit for want of federal jurisdiction.

The District Court, in an opinion styled by the Circuit Court of Appeals as "well reasoned" (R. 189), relying principally upon two decisions of this Court, *Bardes* v. *Hawarden First Nat. Bank*, (1900) 178 U. S. 524; *Schumacher* v.

Beeler, (1934) 293 U. S. 367, dismissed the suit holding that trustees under Chapter X may bring such a plenary action against adverse claimants in a district other than the reorganization district only if they meet the usual requirements for federal jurisdiction, *viz.*, diversity or other federal ground.

The Circuit Court of Appeals reversed the District Court, avowedly rejecting the authority of these two decisions of this Court on the ground that they erroneously interpreted an earlier case, which passed on the Act of 1867, (*Lathrop* v. *Drake*, [1875] 91 U. S. 516), or as *dicta* not any longer to be followed. The Circuit Court of Appeals held that diversity of citizenship was not necessary; that the enactment of Chapter X enlarged federal jurisdiction to include as "proceedings" in bankruptcy, of which the District Courts as Courts of Bankruptcy are given jurisdiction by Section 2a of the Bankruptcy Act, all plenary suits brought by trustees against adverse parties; and that federal jurisdiction thereof can be exercised irrespective of diversity, by any of the district courts of the United States, and not solely by the one in which the bankruptcy or reorganization petition was filed.

The Circuit Court of Appeals did not discuss the respondents' claim of jurisdiction based on the Judicial Code. The respondents-trustees contended that by their appointment they had become officers of the United States within the meaning of Judicial Code Section 24(1) and that in consequence, their appointment as such trustees makes any suit by them a suit arising under federal law and confers original jurisdiction thereof on any of the district courts. Judicial Code Section 24(1).

Questions Presented.

The precise question before this Court is whether, in the absence of diversity of citizenship, federal jurisdiction exists to entertain a plenary suit by a Chapter X trustee against adverse claimants to recover on an ordinary state-created civil claim for money in a district court other than that wherein the reorganization is pending.

The answer depends on a number of subsidiary questions:

1. Are such plenary suits "proceedings under this Act" within the meaning of Section 2a of the Bankruptcy Act?

2. Is Section 2a of the Bankruptcy Act, including Subdivision 2a(7), a grant of jurisdiction solely over summary proceedings in bankruptcy?

3. Does Section 115 of the Bankruptcy Act, conferring equity receiver's powers on the reorganization court, give federal jurisdiction to every district court to entertain such a plenary suit for money against adverse claimants, in the absence of diversity of citizenship?

4. Are such trustees officers of the United States within Judicial Code Section 24(1) and is every plenary suit wherever brought by such trustees one arising under the Constitution and laws of the United States within the meaning of Judicial Code Section 24(1)?

Reasons for Granting the Writ.

1. The decision below construes a recent statute, Chapter X of the Bankruptcy Act, relating to reorganization of corporations, as a grant and expansion of federal jurisdiction to all the district courts and not solely to the one where the petition was filed. The Court below held that any of the district courts have federal jurisdiction over plenary suits involving ordinary common law, or state-created civil claims by Chapter X trustees against adverse claimants, irrespective of diversity of citizenship. This is an important question of federal law which has not been passed on by this Court since enactment of Chapter X but should be settled by this Court. The issue is of first impression and is of such gravity and general importance in the interests of uniform and proper application of said statute and of marking out

limits of federal jurisdiction as urgently to require review by this Court.

2. The decision below constitutes a far-reaching innovation in the law of federal jurisdiction.

The decision of the Circuit Court of Appeals if permitted to stand, would loose on federal courts a veritable flood of ordinary plenary civil suits on state-created claims, involving no "property" of the debtor, merely because the owner of such claims has submitted to reorganization under Chapter X and irrespective of amount involved, diversity of citizenship or other federal ground. Upon occurrence of reorganization proceedings, the ordinary business of local courts would thereafter be administered by federal courts all over the country without any apparent advantage to the administration and purposes of Chapter X of the Bankruptcy Act. The local courts are and for almost 50 years have been an adequate forum for such local claims. The Congressional policy has been declared by this Court to "leave such controversies to be heard and determined for the most part in State courts 'to the greater economy and convenience of litigants and witnesses.'" *Schumacher* v. *Beeler*, 293 U. S. 367, 374.

The Circuit Court of Appeals itself has said that

> "The issue is of obvious importance in the administration of Chapter X of the Bankruptcy Act * * *." (R. 189).

The United States Securities and Exchange Commission filed briefs below *amicus curiae* stating that it did so

> "because of the importance of this question in the field of corporate reorganizations."

The decision below holds (R. 192) that a plenary suit on state-created rights is within the meaning of "proceedings under this [the Bankruptcy] Act" as employed in Section 2a of the Bankruptcy Act. Since proceedings in bankruptcy are the exclusive concern of federal courts, the holding below necessarily ousts all state courts from jurisdiction over plenary suits by a Chapter X trustee. Moreover, because no absolute right thereto exists in bankruptcy admin-

istration, litigants would necessarily be deprived of the right to a jury trial of ordinary civil claims.

3. The decision below avowedly departs from the construction placed upon Section 2a of the Bankruptcy Act by this Court in two decisions 34 years apart and rendered since enactment of the law. As recently as December 9, 1946, this Court cautioned that "bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court * * *." *Vanston* v. *Green, (Inland Gas Corporation)* — U. S. —. The decision below is in conflict with the interpretations of Section 2a of the Bankruptcy Act made by this Court in *Bardes* v. *Hawarden*, (1900) 178 U. S. 524; *U. S. Fidelity Co.* v. *Bray*, (1912) 225 U. S. 205, 216; *Schumacher* v. *Beeler*, (1934) 293 U. S. 367; *Pepper* v. *Litton*, (1939) 308 U. S. 295, 304, which state that Section 2a of the Bankruptcy Act is a grant of *summary* jurisdiction only, relating only to bankruptcy proceedings or to controversies in such proceedings, on the one hand as distinguished from controversies at law or in equity, on the other hand.

4. The Court below has declared that decisions of this Court are in conflict *inter sese*. The Circuit Court of Appeals has examined the interpretation of *Lathrop* v. *Drake*, (1875) 91 U. S. 516, made by this Court in the later cases of *Bardes* v. *Hawarden First National Bank*, (1900), *supra* (Opinion by Gray, *J.*), *and Schumacher* v. *Beeler*, (1934), *supra* (Opinion by Chief Justice Hughes). Referring to the later interpretative Supreme Court decisions, the opinion of the Circuit Court of Appeals states that "it seems now clear" that *Lathrop* v. *Drake* "should not be so interpreted" (R. 192). Founding an important jurisdictional decision on a supposed misunderstanding by this Court of its own prior decision creates uncertainty and confusion in the construction and application of the Bankruptcy Act and urgently suggests that this Court should consider and announce whether its repeated interpretations of its prior decision, rejected by the Circuit Court of Appeals, should be adhered to.

5. The decision below construes Section 23 of the Bankruptcy Act not as an independent grant of jurisdiction apart from any other provision, but as a limitation of the jurisdiction granted to the district courts by Section 2a and is in conflict with the decision of this Court in *Schumacher v. Beeler, supra*, wherein Chief Justice Hughes stated that "Section 23(b) was thus in effect a grant of jurisdiction * * *" (p. 374).

6. The issue raised concerning the scope of Judicial Code Section 24(1) is novel and of first impression in this Court. The Securities and Exchange Commission stated in its brief *amicus curiae* in the Court below (p. 36):

> "To the best of our knowledge the present case is the first one where a court has been called upon to decide whether a plenary action brought by a Chapter X trustee is one brought by an officer of the United States within the meaning of Section 24(1) of the Judicial Code."

7. The decision of the said Circuit Court of Appeals is in probable conflict with decisions of every other Circuit Court of Appeals, construing ordinary federal jurisdiction of the district courts under the Bankruptcy Act, e.g., *Operators' Piano Co. v. First Wisconsin T. Co.* (1922, CCA 7th), 283 F. 904, and under analogous statutes dealing with reorganization (Sections 77 and 77(B) of the Bankruptcy Act), *viz., In re Standard Gas & Electric Co.* (1941, CCA 3rd), 119 F. (2d) 658; *In re Prima* (1938, CCA 7th), 98 F. (2d) 952, cert. den. sub nom *Keig v. Harris Trust & Savings Bank*, 305 U. S. 658; *Thompson v. Terminal Shares* (1939, CCA 8th), 104 F. (2d) 1, cert. den. 308 U. S. 559.

Wherefore, petitioners pray that a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted.

Dated: January 2, 1947.

MILTON POLLACK,
EMERY H. SYKES,
HORACE R. LAMB,
LEWIS L. DELAFIELD,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The grounds upon which the jurisdiction of this Court is invoked, the opinions below, a statement of the facts involved and the questions presented appear in the accompanying petition, and, for the sake of brevity, are not here repeated.

POINT I.

DIVERSITY OF CITIZENSHIP IS REQUISITE IN A PLENARY SUIT AGAINST ADVERSE PARTIES IN A DISTRICT WHERE REORGANIZATION IS NOT PENDING.

The petitioners contend that diversity of citizenship is requisite to federal jurisdiction herein and that Section 2a(7) of the Bankruptcy Act does not confer such jurisdiction.

A plenary suit on state-created rights is not a proceeding in bankruptcy within Section 2a or 2a(7) of the Bankruptcy Act. (*Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524; *Schumacher* v. *Beeler* (1934), 293 U. S. 367.)

The opinion and decision below in essence hold that diversity of citizenship is not requisite in such a plenary suit and that such a suit is a proceeding in bankruptcy within Section 2a(7), and that this Court's decisions to the contrary are erroneous (R. 195).

The jurisdiction granted by Section 2a including 2a(7) of the Bankruptcy Act is exclusively federal. Judicial Code, Section 256 (as am.) "Sixth"; *U. S. Fidelity & G. Co.* v. *Bray* (1912), 225 U. S. 205; *Pepper* v. *Litton, supra*, at p. 304, ftn. 8. The claims in this suit are traditionally and unquestionably cognizable by the state courts: *Kidder* v. *Horrobin, et al.* (1878), 72 N. Y. 159; *Hastings* v. *Byllesby & Co.* (1941), 286 N. Y. 468. Thus this suit is not within the purview of Section 2a of the Bankruptcy Act.

In *U. S. Fidelity & G. Co.* v. *Bray* (1912), 225 U. S. 205, 217, this Court said after quoting Sections 2a and 2a(7) of the Act of 1898:

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, *the reduction of the estates to money*, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them." (Italics supplied.)

The jurisdiction granted by Section 2a in all subdivisions, is summary only. *Bardes* v. *Hawarden First National Bank*, *supra*; *Schumacher* v. *Beeler*, *supra*; *Pepper* v. *Litton*, *supra*. The fact that by Section 2 a court of bankruptcy may exercise the jurisdiction granted by Section 2a "in vacation, in chambers, * * *" is indicative of a summary, not plenary jurisdiction. *Smith* v. *Mason* (1871), 14 Wall. 419. This is a plenary suit. *Park* v. *Cameron* (1915), 237 U. S. 616. Thus this suit is not within the purview of Section 2a of the Bankruptcy Act or of any of its subdivisions.

Section 2 of the Bankruptcy Act grants jurisdiction over all proceedings in bankruptcy. The 21 enumerated subdivisions list types of proceedings which fall within this concept. Each of the 21 subdivisions affords summary jurisdiction to the Bankruptcy Court. The Bankruptcy Act did not intrude a plenary jurisdiction into Section 2a(7), which is but one of 21 subdivisions all of which provide for exclusively summary jurisdiction.

This plan of the Bankruptcy Act is implicitly recognized by the statute enacting Chapter X (Chandler Act, 1938). By the simple expedient of adding subdivision 21 to Section 2a of the Bankruptcy Act certain suits, formerly plenary, became summary proceedings (*Emil* v. *Hanley* (1943), 318 U. S. 515, 519).

Thus, under Section 2a(7), the Bankruptcy Court may in summary fashion deal with a trustee's petition for permis-

sion to sue adverse claimants in a foreign district, and by summary determination (as in this case) direct the trustee to sue and thereby "cause" the claim to be collected and reduced to money. Again, when the claim has been reduced to the possession of the Bankruptcy Court by the trustee, that Court may in summary fashion determine any controversies in the bankruptcy proceedings themselves.

An ordinary law suit in a district court, other than that court where a petition for reorganization is filed under Chapter X of the Bankruptcy Act, between a trustee and adverse parties on state-created rights is not, as held below, a proceeding in bankruptcy. It is a plenary suit as between party and party and subject to the requirements for federal jurisdiction imposed by the Judicial Code of diversity of citizenship and requisite amount. Jurisdiction of such suits is preserved to state courts except where the federal court is just another local court because of diverse citizenship.

The Bankruptcy Act itself creates two categories, *viz.*, "proceedings" (or "controversies" in such proceedings), on the one hand, over which the Court has summary jurisdiction, and "controversies at law and in equity, as distinguished from proceedings under this Act", on the other hand, which are subject only to a plenary jurisdiction (Sections 2, 23, 24, 25).

Analysis of the Act of 1898, as originally enacted, shows conclusively the mutually exclusive treatment of the summary jurisdiction in bankruptcy proceedings and incidental controversies therein, from the separate provisions for jurisdiction of plenary suits involving controversies at law and in equity between the trustee and adverse parties, strangers to the proceedings.

Section 23 as originally enacted in 1898 provided:

> "JURISDICTION OF UNITED STATES AND STATE COURTS. (a) The United States *circuit* courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concern-

> ing the property acquired or claimed by the trustees, in the same manner and to the same extent *only as though bankruptcy proceedings had not been instituted* and such controversies had been between the bankrupts and such adverse claimants." (Italics supplied.)

Section 23(a) thus required the preexistence of federal jurisdiction under the Judicial Code and, therefore, did not deal with a grant of jurisdiction like that in Section 2. Section 23(a) merely preserved jurisdiction afforded under the Judiciary Act of 1789 as between party and party.

Section 23 further provided:

> "(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Section 23(b) did not affect the distribution of power between state and federal courts. It preserved to debtors of the bankrupt their state rights but it permitted such debtors to consent to federal jurisdiction.

Ordinarily jurisdiction cannot be conferred by consent even by Act of Congress. However,

> "The Congress by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. * * * Exercising that power, the Congress prescribed in Section 23b the condition of consent on the part of the defendant sued by the trustee. Section 23b was thus in effect a grant of jurisdiction subject to that condition." (*Schumacher* v. *Beeler*, *supra*, p. 374.)

Thus, Section 23(b) operates as a grant of a consent jurisdiction, which the Court could not otherwise exercise.

Later, when the courts of bankruptcy were given a jurisdiction concurrent with that of the state courts to entertain plenary suits under Sections 60, 67 and 70 of the Bankruptcy Act relating to fraudulent transfers and preferences, Section 23(b) was also amended by eliminating the requirement for consent in such suits. *Taubel Co.* v. *Fox* (1924) 264 U. S. 426, 433-4. The grant of jurisdiction over the plenary suits so excepted together with the grant of federal jurisdiction in cases of the debtor's consent mark the limit of federal jurisdiction over plenary suits against adverse parties under the Bankruptcy Act. The implication from these express grants of federal plenary jurisdiction fortifies the conclusion drawn from its own terms that a grant of similar jurisdiction is excluded from Section 2 of the Bankruptcy Act.

The distinction between and separate treatment of the summary jurisdiction and of the plenary jurisdiction of the courts follows an historical pattern.

The Act of 1841 (5 Stat. 445) specifically provided in Section 6 that jurisdiction in bankruptcy proceedings was "to be exercised summarily in the nature of summary proceedings in equity." The Act of 1867 (14 Stat. 517) continued the same concept. The jurisdiction in bankruptcy proceedings under Section 1 of that Act was to be exercised in the same manner that circuit courts proceeded in equity, *i.e.*, in summary fashion. *Smith* v. *Mason* (1871), 14 Wall. 419; *Marshall* v. *Knox* (1872), 16 Wall. 551.

In contrast with the provision for summary jurisdiction, the Act of 1841 provided separately in Section 8 thereof (5 Stat. 446) for concurrent jurisdiction in the district and circuit courts of plenary suits, *i.e.*, "all suits at law and in equity which may and shall be brought by an assignee of the bankrupt" against adverse parties. Similarly, the Act of 1867, in Section 2 (14 Stat. 518), provided separately for like concurrent jurisdiction. *Morgan* v. *Thornhill* (1870), 11 Wall. 65; *Wiswall* v. *Campbell* (1876), 93 U. S. 347; *Schumacher* v. *Beeler*, *supra*.

The distinction between and separate treatment of the summary and plenary jurisdictions was not lost sight of in the Act of 1898 in enacting Sections 2 and 23 of that Act. *Bardes* v. *Hawarden First Nat. Bank, supra; Schumacher* v. *Beeler, supra.*

The plenary jurisdiction referred to in Section 23 of the Act of 1898 was different from that granted in the previous acts in failing to afford concurrent jurisdiction and restricting the plenary jurisdiction to the circuit court alone. *Bardes* v. *Hawarden First National Bank, supra;* 30 Congressional Record 601. Until the circuit court was abolished in 1911 plenary suits could not be brought in the district court. Only the circuit court had jurisdiction as between trustees and adverse claimants and this jurisdiction rested on and was subject to the requirements of the Judicial Code, as if bankruptcy had not intervened. During the same period the district courts, on the other hand, had original and exclusive jurisdiction of bankruptcy proceedings, exercisable summarily. The district courts as such, and not as courts of bankruptcy, have since 1911 inherited the jurisdiction formerly exercised by the circuit court. The traditional jurisdiction of district courts as courts of bankruptcy, however, is in *rem*, a summary jurisdiction. *Taubel Co.* v. *Fox* (1924), 264 U. S. 426.

Thus the plan of the Act of 1898 was clear. Of the two federal courts only the circuit court had jurisdiction of controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees and adverse parties, and it had that jurisdiction only in those cases in which federal jurisdiction otherwise existed and that jurisdiction was necessarily one enjoyed not exclusively but concurrently with the state courts. Judiciary Act of 1789; Bankruptcy Act, Section 23(a). On the other hand, the district courts as courts of bankruptcy had original and exclusive jurisdiction of bankruptcy proceedings, exercisable in summary fashion. Bankruptcy Act, Section 2.

The legislative history of the Act of 1898 shows that Section 2 was never thought of as being concerned with ordinary

civil litigations. 30 Congressional Record, p. 601, *et seq.* The desire to restrict federal jurisdiction was clearly manifest. 31 *id.*, pp. 1785, 6433.

This Court has clearly held that Section 2 does not embrace civil actions at law or plenary suits in equity. *Bardes v. Hawarden First National Bank, supra*, page 535:

> "The section (2) nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of incidental powers * * *."

In the discussion of the bill which emerged as the Act of 1898, the Chairman of the Judiciary Committee stated as follows, 31 Congressional Record, p. 1785:

> "The jurisdiction of state courts to try controversies between the trustees of bankrupt estates and parties claiming adverse interest is not in any way interfered with * * *. Under the last bankruptcy law the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was a great inconvenience and much expense * * *. Such will not be the effect under this bill."

It is thus clear from the plain language of the statute, the historical and legislative background and the decided cases, that Sections 2 and 23 of the Act of 1898 refer to basically different jurisdictions and that Section 2 does not embrace this type of suit.

POINT II.

CHAPTER X OF THE ACT OF 1898 AS AMENDED DID NOT ENLARGE SECTION 2 TO INCLUDE PLENARY AS WELL AS SUMMARY JURISDICTION.

By the terms of Section 101, Chapter X relates solely to "proceedings under this chapter" (in reorganization). Chapter X nowhere in terms deals with plenary suits by the trus-

tee as distinguished from reorganization "proceedings". The specific grant of jurisdiction applicable to Chapter X matters is found in Section 114 of the Bankruptcy Act which restricts jurisdiction to the court where the petition is filed, or to the court to which the petition is transferred. Section 118. The definitions in the Act of "the court" dispel all doubt on this point. Sections 1(9), 102.

Section 102 of the Bankruptcy Act incorporates the general provisions of the Act in Chapter X except inconsistent or conflicting provisions, and specifically withdraws Section 23 from application to reorganization proceedings unless bankruptcy is ordered upon failure to consummate a plan for reorganization.

The court below found no basis for federal jurisdiction of this suit within the jurisdictional provisions peculiarly applicable to Chapter X. (Sections 114, 118.) It had to rest its finding of federal jurisdiction solely on Section 2 as imported into Chapter X by Section 102 and stated "it seems clear that in eliminating § 23 from corporate reorganizations under Chapter X, Congress intended to enlarge, rather than restrict, the trustee's choice of forum * * *." (R. 195). The court below reasoned that because greater power of scrutiny was granted to a Chapter X trustee (Sections 165, 167) and because he has the duty to formulate a plan of reorganization (Section 169) therefore, the elimination of Section 23 was intended to enlarge the scope of federal jurisdiction under Section 2 to include plenary jurisdiction to "be exercised by all the district courts, and not solely by the one in which the bankruptcy or reorganization petition was originally filed" (R. 193).

There is nothing in the legislative history of the 1938 amendments to the Act of 1898 (Chapter X) to show any intention of Congress to enlarge the scope of federal jurisdiction. The nation-wide property jurisdiction of the domiciliary court over property of the debtor was a modification of venue requirements and not a grant of a new federal jurisdiction (Section 111).

The concern of Congress in enacting the Act of 1898 had been to limit and restrict the scope of federal jurisdiction. No evidence appears in the legislative history that deviation from that attitude was intended in 1938 or that the distribution of power over state-created rights as between state and federal courts generally, was being realigned.

Section 23 was obviously irrelevant to the purposes of Chapter X. The concern of Chapter X is with "proceedings" (Section 101) to reorganize the debtor. On the other hand, Section 23 is not concerned with administration of property nor proceedings to reorganize the debtor; it is concerned with liquidation. It was because of these differences in purpose and not to enlarge the jurisdiction of the federal courts that Section 23 was specifically designated as one of the sections of the Bankruptcy Act not incorporated in Chapter X.

The plan of Chapter X was to give the trustee powers necessary to effect reorganization in the domiciliary court by "proceedings" (Section 114) and to give him power to deal in that court with matters *in personam* in his capacity as an equity receiver (Section 115). When reorganization efforts fail and liquidation is ordered, the trustee is given an additional aid for liquidation by the grant of jurisdiction under Section 23.

The grant of equity receivership powers (Section 115) to the reorganization court may have been deemed by some in Congress to be inconsistent with Section 23(b). Some law writers (2 *Gerdes on Corporate Reorganization*, p. 1478) and courts* thought the inconsistency existed because of the power of an equity receiver as distinguished from a trustee in bankruptcy to litigate plenary claims in his home court, irrespective of diversity. This power followed from the equity court's property jurisdiction and control. This presumed inconsistency with Section 115 may have been a basis of elim-

* The C. C. A. 3 Cir. held otherwise as to comparable provisions in former Sec. 77-B of the Bankruptcy Act in *In re Standard Gas & Electric Corp.*, 119 F. 2d 658; as did also the C. C. A. 7 Cir. in *In re Prima Co.*, 98 F. 2d 952, cert. den. 305 U. S. 658. *Cf. Warder v. Brady* (C. C. A. 4 Cir.), 115 F. 2d 89.

inating Section 23 from Chapter X. But surely Section 23 was not thought by the Congress to be inconsistent with Section 2; both sections had been in the same statute for 40 years.

While, indeed, Chapter X accords equity receivership powers to the home court, the court's trustee-receiver was not thereby granted access, by reason of his office, to other district courts generally, nor were the limits of jurisdiction of such other courts broadened.

An equity receiver was never afforded access to federal courts other than the domiciliary court, merely by reason of his office, for the purpose of bringing plenary suits *in personam*.

> *Gableman* v. *Peoria D. & E.* (1900), 179 U. S. 335;
> *Barfield* v. *Zenith T. & R.* (1924, N. D. Ohio), 9 F. 2d 204;
> *Kelley* v. *Queeney* (1941, W. D. N. Y.), 41 F. Supp. 1015.

Neither is a general bankruptcy trustee afforded access to federal courts other than the domiciliary court to bring plenary suits *in personam* in the absence of diversity of citizenship.

> "* * * the mere fact that plaintiff was trustee in bankruptcy did not give jurisdiction." (*Spencer* v. *Duplan Silk Co.* (1903), 191 U. S. 526, 531.)

A Chapter X trustee has no need for greater access to federal courts to collect debts than that accorded to a bankruptcy trustee. The prime function of a bankruptcy trustee is to liquidate, collect and distribute. The reorganization trustee's purpose is not primarily liquidation but to maintain the *status quo* and to realign interests.

The state courts afford an adequate forum and have been employed for such suits as this (*Hastings* v. *Byllesby & Co.* (1941), 286 N. Y. 468).

In view of *Erie* v. *Tompkins*, (1938), 304 U. S. 64, requiring that state law be applied to state-created rights, the trustee would gain nothing by federal jurisdiction over such suits as these. The quest for a competitive forum to institute litigation on state-created rights should have ended since the decision of that case, and no presumed policy of Chapter X is fostered by a federal forum for suits such as this.

The general consequence of the decision made by the Circuit Court of Appeals on the scope of federal jurisdiction transcends this particular suit and seems not to have been appraised by the lower court and is not adverted to in the opinion below. Under the lower court's holding every $20 claim against adverse parties by a bankrupt undergoing reorganization would come within federal jurisdiction irrespective of the fact that such adverse parties may be located in any of the 47 states other than that where the reorganization is pending. To bring such claims within general federal jurisdiction the lower court has classified them as "proceedings" in bankruptcy. As we have shown above the consequence is to make the jurisdiction of any federal court *exclusive* over such claims. (Judicial Code, Section 256 [as am.] "Sixth"). The further consequence is to deprive the defendant of the right to a jury trial, which in bankruptcy proceedings is restricted largely to the issue of insolvency. Section 19, Bankruptcy Act.

The federal district courts have not had such a large grant of federal jurisdiction as is given by the decision below since the repeal of the Act of 1867.

POINT III.

THE JUDICIAL CODE DOES NOT CONTAIN A GRANT OF FEDERAL JURISDICTION OVER THIS SUIT.

1. No federal question is involved in this suit. This suit does not arise under the laws of the United States but seeks

to enforce a state-created claim which existed apart from bankruptcy. The trustee's right to sue was inherited from the debtor and the bankruptcy reorganization created no new substantive rights. The alleged misconduct is not condemned either by the Constitution or by federal statute. The fact that the respondents are trustees is not an essential element on which the result will turn. *Spencer* v. *Duplan Silk Co.* (1903), 191 U. S. 526, 530; *Gully* v. *First National Bank* (1936), 299 U. S. 109.

2. Plaintiffs are not officers of the United States within the meaning of Section 24(1) of the Judicial Code. This is a private controversy in which no interest of the United States is at stake. The cases involving receivers of national banks do not apply. Such receivers are officers of the executive branch of the government and are not officers of the court. *Wittnebel* v. *Loughman*, 9 F. Supp. 465, 467; aff'd 80 F. 2d 222; cert. den. 297 U. S. 716; *Cf. Wheeler* v. *Greene* (1929), 280 U. S. 49, 51; *Oosterhuis* v. *Palmer*, 137 F. 2d 322, 325.

CONCLUSION.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers by writ of certiorari.

Dated: January 2, 1947.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

The BANKRUPTCY ACT OF 1898, as amended, provides:

Sec. 1(9); 11 U. S. C. A. § 1(9)

"Meaning of Words and Phrases.—The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * *

"(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending; * * *"

Secs. 2a and 2a(7); 11 U. S. C. A. §§ 11 and 11a(7)

"Creation of Courts of Bankruptcy and Their Jurisdiction.—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to— * * *

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; * * *"

Sec. 23; 11 U. S. C. A. § 46

"Jurisdiction of United States and State Courts.—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or

claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in §§ 60, 67, and 70 of this Act."

Sec. 101; 11 U. S. C. A. § 501

"The provisions of this chapter shall apply exclusively to proceedings under this chapter."

Sec. 102; 11 U. S. C. A. § 502

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That § 23, subdivisions h and n of § 57, § 64, and subdivision f of § 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under § 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered."

Sec. 111; 11 U. S. C. A. § 511

"Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Sec. 114; 11 U. S. C. A. § 514

"Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication."

Sec. 115; 11 U. S. C. A. § 515

"Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

The JUDICIAL CODE, as amended, provides:

Sec. 24(1) (in part); 28 U. S. C. A. § 41(1) (in part)

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, * * *"

Sec. 24(19); 28 U. S. C. A. § 41(19)

"The district courts shall have original jurisdiction as follows:

"Nineteenth. Of all matters and proceedings in bankruptcy."

Sec. 256(Sixth); 28 U. S. C. A. § 371(Sixth)

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: * * *

"Sixth. Of all matters and proceedings in bankruptcy."